United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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ORIGINAL

76-7410

B/S

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United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN GREETINGS CORPORATION,

Appellant,

v.

WESTRANSCO FREIGHT COMPANY, INC. and ASSOCIATED FREIGHT LINES, INC.,

Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

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BRIEF FOR APPELLEE, WESTRANSCO FREIGHT COMPANY, INC.

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BRIEF FOR APPELLEE, WESTRANSCO FREIGHT COMPANY, INC.

The Issue Presented for Review

Does plaintiff's failure to comply with the provision in the uniform interstate bills of lading requiring that, as a condition precedent to recovery, written claim be filed with defendant within nine months after the shipments should have been delivered, preclude it from recovering for damage to the shipments for which the bills of lading were issued?

Statement of the Case

The facts underlying this action are undisputed.

The defendant-appellee, Westransco Freight Company, Inc. ("Westransco"), is an interstate freight forwarder subject to regulation by the I.C.C. (R.A. 23). On March 14, 1974, Westransco's agent picked up five shipments of merchandise from plaintiff-appellant, American Greetings Corporation ("American"), in Osceola, Arkansas for delivery to various United States Air Force bases in California. Five separate uniform interstate bills of lading were issued for the shipments (R.A. 45, 49-53). The third-party defendant, Associated Freight Lines, Inc. ("Associated"), received the shipments for completion of transportation and delivery; its vehicle was involved in an accident on March 27, 1974 in which the shipments were destroyed (R.A. 46).

On April 19, 1974, Westransco wrote letters to American and to the consignees informing them of the accident and that the shipments were considered total losses. The letters also stated:

> "Copy (copies) of our billing is attached for your ready reference and to assist you in filing claim." (R.A. 54)

American did not file a written claim until January 23, 1975 for two shipments, and until May 30, 1975 for the remaining three, or, respectively, more than 10 months and 14 months after the shipments should have been delivered (R.A. 25, 32-41, 59, 88).

American brought this action to recover $10,208.88, the alleged value of three of the shipments and the released value of the remaining two (R.A. 61-65).

Westransco impleaded Associated on the basis of an indemnity provision contained in the agreement between them (R.A. 9-11).

Westransco's answer (R.A. 6-11) pleaded as a first affirmative defense that American's failure to comply with the following provision in the uniform bills of lading issued for the shipments barred it from making any recovery in this action:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

Associated's second affirmative defense in its answer to the third-party complaint is to the same effect (R.A. 16, 17).

Westransco moved in the District Court for summary judgment dismissing the complaint on the basis of American's admitted failure to file a claim in writing within the nine-month period specified in the bill of lading.

American cross moved for summary judgment on the basis of the admitted loss of the shipments during transit. In opposition to Westransco's motion, American contended that Westransco's awareness, within the nine-month period,

of the destruction of the shipments dispensed with the requirement that claim in writing be made.

The District Court granted Westransco's motion; its decision (R.A. 87-91) states in part that, "The law is settled that the filing of a written claim within the time limit prescribed by the bill of lading is a condition precedent to recovery"; that "The requirement of the filing of a written claim remains the law", and that "as plaintiff concedes, no writing exists [illegible] other than defendant's notice to plaintiff of the loss dated April 19, 1974. This does not suffice."

POINT I

The District Court properly dismissed the complaint because plaintiff's admitted failure to file written claim with defendant within nine months of the date when the shipments should have been delivered precludes recovery for damage thereto.

The bill of lading provision requiring the filing of a written claim within the nine-month period is sanctioned by statute. The Interstate Commerce Act at 49 U.S.C.A. §20(11) states in part:

> ". . . it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation or otherwise a shorter period for the filing of claims than nine months, . . .".

The Supreme Court has characterized the requirement that a written claim be filed with the carrier within a specified period as "a precaution of obvious wisdom". In *Georgia, Florida and Alabama Railway Company* v. *Blish Milling Co.*, 241 U.S. 190, 36 S.Ct. 541, 60 L.Ed. 948, action was brought against an interstate carrier to recover for

damage to freight. The bill of lading covering the shipment required that written claim had to be filed with the carrier:

> ". . . within four months after the delivery of the property, or, in the case of failure to make delivery, then within four months after a reasonable time for delivery had elapsed. Unless claims are so made, the carrier shall not be liable."

The Court held that failure to comply with this provision would preclude recovery from the carrier. The Court expressed the purpose of such requirement (241 U.S. at 196):

> "The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

The issue here presented for determination has been passed upon by the Supreme Court, the U.S. Courts of Appeal for the First, Fifth, Sixth, Eighth and Ninth Circuits and by a District Court in the Third Circuit, all of which have rejected the contention that a carrier's awareness of loss or damage dispenses with the requirement that written notice be given. They have determined that failure to file a claim in writing within the period prescribed in the bill of lading constitutes an absolute bar to recovery from the carrier, notwithstanding such knowledge.

To the contrary is the decision of the Seventh Circuit in *Hopper Paper Company* v. *Baltimore & Ohio Railroad Company*, 178 F.2d 179, which involved the extreme cir-

cumstance that the carrier retained the damaged merchandise and sold it for salvage without the owner's knowledge and attempted to retain the salvage proceeds without accounting to the owner. The holding in the *Hopper* case has been limited by lower courts in the Seventh Circuit to that precise factual situation and it has been rejected by other circuits. This was noted by the Court below (R.A. 88, 89):

> "Plaintiff's reliance on Hopper Paper Co. v. Baltimore & Ohio R.R., 178 F.2d 179 (6th Cir. 1949), cert. denied, 339 U.S. 943 (1950), which held that in the case where the carrier had actual knowledge of the damage, a failure to file a timely claim would be excused is misplaced. Other federal courts have rejected its holding and held that the carrier's knowledge of damages is immaterial to the requirement of a written notice of claim. East Texas Motor Freight Lines v. United States, supra; Northern Pacific Ry. v. Mackie, 195 F.2d 641 (9th Cir. 1952); Insurance Company of North America v. Newtowne Mfg. Co. 187 F.2d 675 (1st Cir. 1951). In Delphi Frosted Foods Corp. v. Illinois Central R.R., 188 F.2d 343 (6th Cir.), cert. denied, 342 U.S. 883 (1951), the Sixth Circuit limited Hopper to its 'peculiar facts,' which included the carrier's selling the salvage without plaintiff's knowledge and without accounting to the plaintiff for the proceeds."

The net result of this array of judicial authority is that the appellant is forced to place almost total reliance on the *Hopper* case, which it contends is "precisely on point here" (Appellant's brief p. 7) although it presented no evidence to the Court below that defendant retained and sold the damaged merchandise for salvage. The *Hopper* case is referred to in 13 of the 30 pages com-

prising appellant's brief, which ignores or glosses over the following formidable authorities to the contrary:

In *St. Louis Iron Mountain & Southern Railway Company* v. *Starbird*, 243 U.S. 592, 37 S.Ct. 462, 61 L.Ed. 917, action was brought against an interstate carrier for damage to a shipment of peaches by failing to properly refrigerate the cars in which they had been transported. The applicable bill of lading provided that:

> "Claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable."

No written notice was given within the thirty-six hour period. Plaintiff's evidence at trial tended to establish that the delivering carrier's dock superintendent at the place where delivery was made knew the damaged condition in which the shipment had arrived. Plaintiff contended that there was no necessity for written notice because of such knowledge and it prevailed on such contention through the highest state court (Arkansas). The Supreme Court reversed such determination and stated (243 U.S. at 606):

> "We find nothing unreasonable in the stipulation concerning notice, and there was no attempt made to comply with it. We therefore think the Supreme Court of Arkansas erred in holding that the verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract."

In *Southern Pacific Company* v. *Stewart*, 248 U.S. 446, 39 S.Ct. 133, 63 L.Ed. 350, action was brought against an interstate carrier for damage and destruction to a shipment of livestock. The applicable bill of lading provided that:

> "Second party [the shipper] hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the freight claim agent of first party in writing, within ten days after unloading of the live stock; . . ."

No written claim had been made within the ten-day period. At trial plaintiff introduced evidence tending to establish that the carrier had full knowledge of the injuries sustained by the cattle; that they had been unloaded into the defendant's stock pens where five died; that upon reloading, the carrier had provided a special car for sick and crippled animals; that at various points en route, various officials of the carrier had made inquiries of other of its officials regarding the condition of the cattle, and that after unloading at destination, the plaintiff and the carrier's agents were in communication regarding the damages sustained. The District Court had charged the jury that if they believed that the defendant's agents or employees knew that some of the cattle had died and that some had been injured during transit, then plaintiff was relieved of the requirement for giving written notice. The Court of Appeals for the Ninth Circuit affirmed a judgment for the plaintiff. The Supreme Court reversed; it held that the trial court erred in giving to the jury the above instruction and that "it should have granted the carrier's request for a directed verdict." The Court stated (248 U.S. at 449, 450):

"Considering the principles and conclusions approved by our opinions in St. Louis, I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462, and Erie R. Co. v. Stone, 244 U. S. 332, 61 L. ed. 1173, 37 Sup. Ct. Rep. 633 (announced since the judgment below), and the cases therein cited, no extended discussion is necessary to show that upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract."

In *Olson* v. *Chicago B. & Q. R. Co.*, 250 F. 372 (8th Cir. 1918) action was brought to recover for loss and injury to cattle transported under a bill of lading which required that written claim had to be made on the carrier's freight claim agent within ten days after unloading, "and that in the event of failure so to do, all claims for loss or damage in the premises are hereby expressly waived, released and made void". One of the carrier's freight inspectors had examined the cattle during transportation and knew they were chilled or frozen. He nevertheless ordered them unloaded at a point prior to destination where they were fed and watered in muddy pens and where several of them died. Other cattle died at a second stop prior to ultimate destination. The plaintiff had told the carrier's agent at destination that he would claim damages for the loss they sustained. However, no written notice of claim was given within the ten-day period prescribed in the bill of lading.

The District Court directed a verdict for the defendant at the close of the plaintiff's case because of the lack of

written notice within the ten-day period. The United States Court of Appeals for the Eighth Circuit affirmed and stated (250 F. at 376):

> "The knowledge of the situation of the cattle on that day and night and on the next day by Mr. Scott was by no means the equivalent of a notice by the shipper of his claim for damages. The extent of the damage was probably not then known, nor was it known that Olson would claim any damages, nor could any one perceive what part of the damages, if any, was chargeable to the railroad company. To hold that the oral notice to Mitchell at Billings was sufficient would be to abrogate the express terms of the contract which the parties voluntarily made. Chesapeake & Ohio R. Co. v. McLaughlin, 242 U. S. 142, 37 Sup. Ct. 40, 61 L. Ed. 207; Clegg v. St. Louis & S. F. R. Co., 203 Fed. 971, 973, 122 C. C. A. 273; Kidwell v. Oregon Short Line R. Co., 208 Fed. 1, 3, 125 C. C. A. 313.
>
> The result is that there was no error in the trial of this case, and the judgment below must be affirmed."

In *Delphi Frosted Foods Corp.* v. *Illinois Central R. Co.*, 188 F. 2d 343 (6th Circuit, 1951) cert. den. 342 U.S. 833, action was brought against an interstate carrier for damage to a shipment of fruit. The carrier's agents had inspected the freight at destination and noted the extent of the damage. Some of the contents of the shipment were condemned by the Food and Drug Administration. The United States Court of Appeals for the Sixth Circuit affirmed judgment for the defendant because of plaintiff's failure to file written claim within nine months after delivery, as required by the "bill of lading authorized under the Interstate Commerce Act." The Court rejected plain-

tiff's contention that "the requirement of notice of claim was substantially complied with" and stated (180 F.2d at 345):

> "To hold that the filing of the claim is dispensed with under the circumstances of this record would be to 'alter the terms of a contract, made in pursuance of the Interstate Commerce Act and having in effect, the quality of a statute of limitation, and thus to open the door for evasions of the spirit and purpose of the act to prevent preferences and discrimination in respect of rates and service.' Chesapeake & Ohio Ry. Co. v. Martin, supra, 283 U.S. at page 222, 51 S.Ct. at page 458."

The Court cited the *Hopper* case and declined to follow it, stating (180 F.2d at 345):

> "As expressly stated in the opinion therein, Hopper Paper Co. v. Baltimore & Ohio R. Co., 7 Cir. 178 F.2d 179, is based upon the peculiar facts of the case."

In *Insurance Co. of North America* v. *Newtowne Mfg. Co.*, 187 F.2d 675 (1st Circuit, 1951), plaintiff brought action on a transportation policy insuring against loss of merchandise while in transit. The insurer impleaded the interstate carrier which had lost plaintiff's property. Although no written claim had been filed with the carrier within the nine-month period provided in the bill of lading, all of the documents which would support a claim had been shown to the carrier's agents when oral claim was presented to it within the aforesaid period. The District Court awarded judgment to the plaintiff against the defendant and in favor of the third-party defendant dismissing the third-party complaint. The U.S. Court of Appeals for the First Circuit affirmed dismissal of the

third-party complaint on the basis of the failure to file a written claim within the prescribed time. The Court rejected the third-party plaintiff's contention that there had been "a substantial compliance with the requirement of a claim in writing" and stated that "Hopper Paper Co. v. Baltimore & Ohio R. R. Co., 7 Cir., 1949, 178 F2d 179, seems perhaps out of line with the other cases" (187 F2d at 681).

In *Northern Pacific Railroad* v. *Mackie*, 195 F.2d 641, (9th Circuit, 1952), plaintiffs brought action against an interstate carrier to recover for damage to freight. An employee of the carrier had inspected the shipments upon arrival at destination, and he made a written report which noted that damage had occurred thereto. During the course of the ensuing months, plaintiffs discussed their claim with the chief clerk in the defendant's freight claim department. Plaintiffs advised the clerk that a formal claim was delayed by inability to complete a deal for the sale of the damaged freight, and the amount of the loss could not be determined. Written claim was not filed within the nine-month period prescribed in the bill of lading. The District Court granted judgment to the plaintiff on the basis of the *Hopper* case that the carrier "knew immediately after the arrival of the shipment that it had damaged the same, and that it then had as much, if not more, knowledge in relation to the damages as the plaintiff, and at all times had or was chargeable with actual knowledge of all the conditions as to the damage." (195 F2d at 642). The U.S. Court of Appeals for the Ninth Circuit reversed and ordered the complaint dismissed because of plaintiff's failure to file a written claim within the prescribed time. The Court stated (195 F2d at 642, 643):

> "A study of the federal decisions, including those of the Supreme Court, makes it clear that some sort

> of written notice of claim is essential. It is not enough that the carrier had actual knowledge that damage occurred, or that an oral claim for damages was made.
>
> • • •
>
> Appellees cite numerous state decisions, but rely mainly on the holding of the Seventh Circuit in Hopper Paper Company v. Baltimore & O. Ry. Co., 178 F.2d 179. There, an interstate shipment of paper was almost totally destroyed in a wreck. The carrier sold the salvaged goods for $100 without notifying the shipper. The court was of the opinion that actual knowledge on the part of the carrier of all the facts was sufficient notice of claim, without more. Whether, in light of the unusual circumstances of that case, the holding is reconcilable with the federal rule we need not stop to inquire.
>
> There are two later federal decisions on the subject, both of which adhere to the long recognized rule requiring written notice. One of these, Insurance Company of North America v. Newtowne Manufacturing Company, 187 F.2d 675, is by the First Circuit; the other, Delphi Frosted Foods v. Illinois Central Ry. Co., 188 F.2d 343, is by the Sixth."

In *East Texas Motor Freight Lines* v. *United States*, 239 F.2d 417 (5th Cir., 1956), the District Court awarded judgment to the United States against an interstate carrier for damage to a shipment of machinery on the basis that the bill of lading requirement that claim in writing be made was excused because "the carrier knew that the damage had actually occurred to the shipment which it had carried." The U.S. Court of Appeals for the Fifth Circuit reversed and stated (239 F2d at 418, 420, 421):

"We think this holding was, under the facts of this case, contrary to the law as established in an unbroken line of decisions of the Supreme Court holding that this requirement of notice is valid and must be observed by shippers and carriers alike.... This knowledge acquired by the carrier does not, in our opinion, have the effect of releasing appellee from the obligation of complying with the provisions as to notice set forth in the contract of carriage.

• • •

Appellee stakes its chief reliance on Hopper Paper Co. v. Baltimore & Ohio R.R. Co., 7 Cir., 1949, 178 F.2d, certiorari denied 339 U.S. 943, 70 S.Ct. 797, 94 L.Ed.1359, and Loveless v. Universal Carloading Co., 10 Cir., 1955, 225 F.2d 637.

• • •

The case before us in, in our opinion, controlled by the Supreme Court decisions, supra, and we adhere to the principles thus clearly established even if our conclusions should be considered at war with the decisions so relied upon by appellee."

In *Penn State Laundry Co.* v. *The Pennsylvania Railroad Company*, 134 F.Supp. 955 (U.S.D.C.-W.D. Pa., 1955), action was brought against an interstate carrier for damage to a shipment of machinery. At trial, plaintiff relied upon the *Hopper* case. It sought to avoid the requirement for written claim with evidence that it had given oral notice to the defendant within the nine-month period and that the damaged freight was inspected by the carrier's representative who had prepared a damage report. Plaintiff contended that written notice was waived or "should not be required in the presence of actual notice". The Court directed a verdict for the defendant

because of the absence of a written claim; it stated (134 F.Supp. at 956, 957):

> "However, the decided cases are squarely opposed to plaintiff's contentions.
>
> • • •
>
> Hopper Paper Co. v. Baltimore & O. R. R. Co., 7 Cir., 1949, 178 F.2d 179, certiorari denied, 1950, 339 U.S. 943, 70 S.Ct. 797, 94 L.Ed. 1359, is distinguishable on its facts. Although the language of the opinion suggests, contrary to the cases cited above, that actual knowledge may suffice in place of a written claim, subsequent decisions have limited the Hopper Paper case as authority to its factual situation. Northern Pac. Ry. v. Mackie, supra, 195 F.2d at page 643; Delphi Frosted Foods Corp. v. Illinois Cent. R. R., supra, 188 F.2d at page 345; Insurance Co. of North Amer. v. Newtowne Mfg. Co., supra, 187 F.2d at page 681; Public Service Electric & Gas Co. v. Reading Co., 17 N.J. Super. 148, 85 A.2d 548, 549, motion for new trial denied, 1951, 17 N.J.Super. 536, 86 A.2d 318, affirmed per curiam, 1952, 9 N.J. 606, 89 A.2d 242."

Henry Pratt Co. v. Stor Dor Freight Systems, Inc.; 416 F.Supp. 714 was recently decided by a U.S. District Court in the Seventh Circuit (wherein *Hopper* was decided). A shipper brought action against the initial carrier to recover for the loss of the shipment resulting from an accident while it was in the possession of a subsequent carrier. The defendant moved for summary judgment on the basis that no claim in writing was made within the nine-month period required by the bill of lading. In granting defendant's motion, the Court stated in its opinion (416 F.Supp. at 715):

> "We do not believe that Hopper Paper Co. v. Baltimore & Ohio R. Co., 178 F.2d 179 (7th Cir. 1949) should be extended beyond its own particular facts which differ from those in the case at bar."

It follows that the determination of the Court below is consistent with the overwhelming weight of judicial authority and that defendant's motion for summary judgment dismissing the complaint by reason of plaintiff's acknowledged failure to file a written claim within the nine-month period prescribed in the bill of lading was properly granted and should be affirmed.

POINT II

Westransco cannot be estopped from asserting the requirement for a written claim because it did nothing to prevent the filing of such claim.

Appellant argues that Westransco should be estopped from relying upon the provision requiring a written claim, not because of any wrongdoing on Westransco's part, but because within the ninth-month period it notified plaintiff in writing that the shipments were considered total losses. It is well settled, however, that an interstate carrier is not estopped from asserting the requirement for a written claim because it conducted an investigation, or because it had actual knowledge that damage occurred to the shipment. The applicable principle of law was set forth with clarity in *Lucas Machine Division, etc.* v. *The New York Central Railroad Co.*, 236 F. Supp. 281 (U.S.D.C., N.D. Ohio, 1964) as follows (236 F. Supp. at 282):

> "The bill of lading here in question provided that as a condition precedent to recovery, claims must be filed in writing within nine months after

> delivery of the property. A review of the federal decisions clearly shows that a written notice, however informal, must be filed with the defendant railroad. The railroad is not estopped or does not waive this requirement in the following circumstances: Where the railroad actively negotiated with the plaintiff for a settlement of the claim; where an oral claim was made for damages; where the railroad had conducted an investigation, and where the railroad had actual knowledge that damage had occurred. Starbird v. St. Louis, I. Mt. & So. R. Co., 243 U.S. 592, 37 S.Ct. 462, 61 L.Ed. 917 (1917), Southern Pacific Company v. Stewart, 248 U.S. 446, 39 S.Ct. 139, 63 L.Ed. 350 (1919), Northern Pacific Railway Co. v. Mackie, et al., 195 F.2d 641 (9th Cir., 1952), B. A. Walterman Company v. Pennsylvania Railroad Company, 295 F.2d 627 (6th Cir., 1961)."

A common interstate motor carrier can be estopped from relying upon the requirement that written claim be filed only when it has by affirmative conduct prevented such filing. In *Lehigh Valley Railroad Co. v. State of Russia*, 21 F.2d 396 (2nd Circuit, 1927) cited by Appellant, the carrier reported the loss to the consignee and advised him to file his claim in a place different from that where the bill of lading recited that such claim should be filed. This Court held that after the consignee had filed a written claim within the prescribed period at a place different from that stated in the bill of lading in accordance with the carrier's directions, the carrier was estopped from asserting that the claim was not filed as required by the bill of lading. This case is clearly distinguishable. In the instant case there is no evidence that plaintiff was prevented from filing a timely written claim because of any act or conduct on the part of Westransco. The evidence

establishes the contrary. Rather then prevent the filing of a written claim, Westransco actually invited one. Its letter of April 19, 1974 was accompanied by a document "to assist you in filing claim" (R.A. p. 54). Thus, the essential element of estoppel is lacking in this case.

Lastly, Appellant argues that there was substantial compliance with the bill of lading requirement because Westransco gave notice in a writing which identifies the shipment and describes the destruction of the shipment." It therefore "filed a claim in writing with itself on behalf of the shipper." (Appellant's brief, pp. 19, 20). Appellant urges this Court to hold that "American Greetings substantially complied with the claim requirement when Westransco 'filed' the April 19, 1974 letter (R.A. p. 54) 'with' itself on behalf of American Greetings" (Appellant's brief, p. 27).

This contention is without merit. It overlooks that the Supreme Court in *Georgia, Florida and Alabama Railway Company* v. *Blish Milling Co.*, supra, specifically stated that it was reasonable that a carrier require "notice of all claims against it *even with respect to its own operations.*" (Emphasis supplied).

Such contention overlooks the holding in *Delphi Frosted Foods Corp.* v. *Illinois Central Railroad Co.*, supra, where the plaintiff attempted to rely on the written claim made within the prescribed time by its customers who had contracted to purchase portions of the shipment. The plaintiff contended that the requirement that the claim be in writing had been substantially complied with. The Court rejected such contention and stated (188 F.2d at 345):

> "The District Court correctly concluded that the notice contemplated by the bill of lading is to be given

> by the claimant and not by others. Notice to the delivering carrier was sufficient; but the assertion of damage by persons who had contracted for some portion of the goods, title to which had not passed, persons who were not agents of the appellant, did not constitute such a claim as was required."

It follows that if persons who had contracted to purchase portions of the shipments are not agents of the shipper to file written claim, *a fortiori,* the carrier cannot be deemed to be the agent of the shipper to make claim upon itself in behalf of the shipper.

To hold the contrary would make it expedient for interstate carriers to withhold information regarding loss or damage to shipments from shippers and consignees, rather than risk having their correspondence qualify as claims under the bill of lading.

One of the fallacies inherent in appellant's contention is that it equates knowledge by the carrier that loss or damage to freight has occurred with knowledge that the owner will press a claim therefor. The distinction between the two is one of substance, as was pointed out by Mr. Justice Learned Hand in *Anchor Line Ltd.* v. *Jackson,* 9 F.2d 543, as follows:

> "The upshot of these cases is that notice that the goods have been damaged is not notice of a claim for recoupment. The result is perhaps a narrow interpretation, and has not been established in this circuit without strong opposition. Its existence is, however, unquestioned, and it seems to us undesirable by nice distinctions to invite perpetual litigation in its application. There can, indeed, be no doubt that it is one thing to advise a ship of the

> fact that she has discharged damaged goods and another that you mean to hold her for the loss. The two may shade into each other, but they are quite distinct. We may concede that notice of damage ordinarily presupposes that the consignee is contemplating a claim, but it is not equivalent even to an assertion that he will make one in the future; certainly it is not a claim in præsenti. He may conclude that he has no rights against the ship under the bill of lading, or that, if he has, it is not worth his while to press them. A protest is not a claim."

This distinction was alluded to by the Court in *Henry Pratt Co.* v. *Stor Dor Freight Systems Inc.*, supra, as follows (416 F. Supp. at 715):

> "We might add that there could be many reasons why claims are never filed, other than mere negligence or oversight. They might be covered by other insurance, the consignor might prefer to take a tax deduction, or the consignor might be a subsidiary or otherwise have a financial interest in the carrier. Therefore, in order for a carrier and its accountants to know what contingent or other liabilities exist at any given time, it should be able to rely upon applicable statutes of limitations. As a matter of common equity between contracting parties, the widely criticized *Hopper* decision should not be extended."

There is no basis in this action for invoking the doctrine of estoppel against Westransco. Since the latter's letter to the plaintiff and to the consignees, as stated by the Court below, "does not suffice" as the written claim required by the bill of lading, it follows that summary judgment dismissing the complaint has been properly granted. The determination of the District Court should be in all respects affirmed.

Respectfully submitted,

TELL, CHESER, BREITBART & LEFKOWITZ
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GEORGE GRIFFITH

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMER GREETING CARDS

VS

WESTRANCO FREIGHT CO

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NY , ss:

ROBERT FORD being duly sworn,

deposes and says that he is over the age of 21 years and resides at 755 hancock st

That on the 11th day of november, 1976 19 at

he served the annexed brief for appellee Westransco upon

1. Arsham7Keenan, 277 park ave 2. Hill Rivkin, Carey Loesberg &O'Brien, 96 fulton

in this action, by delivering to and leaving with said attorneys

three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is nct a party to the action.

Sworn to before me, this 11th day of v november, 1976 19

Robert L. Ford

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware Coun
Commission Expires March 30, 1977